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Mukhtar Shaker Aslien v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO D-05–135 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
28 MARCH 2013

B

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking 8,488g of ketamine — Appeal against conviction and sentence — Dangerous drugs found inside picture frames carried by appellant at airport — Whether knowledge of drugs could be inferred from appellant's conduct — Whether knowledge of drugs established — Whether appellant had custody and control of drugs — Whether statutory presumption of possession rebutted — Whether conviction for trafficking was safe — Dangerous Drugs Act 1952 ss 37(d) & 39B(1)

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D

PW4 (a customs officer) was on duty at the inspection counter where transit baggages are inspected at the Kota Bharu Airport, checking the luggages of disembarking passengers from flight MH1396. PW4 noticed the appellant, an Indian national, pushing a trolley laden with two big bags and a sling bag on it towards the customs checkpoint. PW4 stopped the appellant to inspect the bags. Inside, PW4 saw picture frames wrapped in gift paper wrappings. PW4 instructed the appellant to open the wrapper of one of the picture frames. PW4 found the picture frame to be screwed and requested the appellant to open the picture frames with a screw driver. PW4 observed that when the appellant was opening the screws with the screw driver, the appellant's hands were shaking and his facial complexion turned red. When the appellant prised and broke open the picture frames, PW4 found black plastic tapes placed along the four corners of the picture frames. PW4 instructed the appellant to remove the black plastic tapes but the appellant refused to do so. PW4 then opened the black plastic tapes and found ketamine therein. The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for trafficking in 8,488g of ketamine. In his defence, the appellant testified that he was a salesman selling sarees and Punjabi suits from India. According to the appellant, two of his business friends known as Ansari and Sarajuddin from India had requested him to bring the bags containing picture frames to Kota Bharu. The appellant claimed that he did not know that the picture frames contained drugs. It was submitted that the physical condition of the picture frames showed that they could not be easily opened in order to discover their contents and that the drugs were embedded therein. Hence, the court was invited to draw an inference that the appellant could not have had knowledge of the drugs that were embedded in the picture frames. The High Court judge

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convicted the appellant and sentenced him to death. The appellant appealed against conviction and sentence.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Knowledge is an essential ingredient to an offence of drug trafficking. It is a question of fact whether the element of knowledge has been proven by the prosecution. Knowledge can be proved in three ways. Firstly, by direct evidence. Secondly, by circumstantial evidence or by inference. Thirdly, with the aid of the presumption under s 37(d) of the DDA (see para 24).

(2) The ingenious method of transporting the dangerous drugs from India to Kuala Lumpur and finally to Kota Bharu via flight indicated that the appellant had knowledge of the presence of the dangerous drugs that were embedded in the picture frames. The appellant had travelled to Kota Bharu some three months prior to his arrest and there was no scanning machine at the Kota Bharu Airport. Without the scanning machine, baggages would have to be manually checked. If PW4 did not check the appellant's bags, the drugs concealed in the picture frames would not have been detected and would enter Malaysia. The appellant was in possession of the dangerous drugs that were recovered from his bags which were found with him at the Kota Bharu Airport (see paras 27 & 30).

(3) The reluctance of the appellant to open the black plastic tapes that covered the four corners of the picture frames showed that the appellant had knowledge of the presence of the dangerous drugs that were embedded in the picture frames (see para 30(f)).

(4) The evidence were more than sufficient to conclude that the appellant had possession of the dangerous drugs found in the bags (see para 31).

(5) The appellant did not take the trouble to inspect the contents of the bags and he merely relied on the assurances of Ansari and Sarajuddin from India. The appellant was not a simpleton nor was he naive or gullible. The appellant failed to rebut the statutory presumption of possession under s 37(d) of the DDA on the balance of probabilities. The appellant was guilty of willful blindness to the obvious truth of the matter (see para 39).

[Bahasa Malaysia summary

PW4 (seorang pegawai kastam) sedang bertugas di kaunter pemeriksaan di mana bagasi-bagasi transit diperiksa di Lapangan Terbang Kota Bharu, memeriksa bagasi penumpang-penumpang yang turun daripada kapal terbang MH1396. PW4 melihat perayu, seorang warganegara India, menolak troli penuh dengan dua beg besar dan satu beg sandang di atasnya ke arah tempat pemeriksaan kastam. PW4 menahan perayu untuk memeriksa beg tersebut. Di

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dalamnya, PW4 melihat bingkai gambar yang dibalut dengan pembalut hadiah. PW4 mengarahkan perayu membuka salah satu pembalut bingkai gambar tersebut. PW4 mendapati bingkai gambar tersebut diskrukan dan meminta perayu untuk membukanya dengan pemutar skru. PW4 melihat bahawa ketika perayu membuka skru tersebut dengan pemutar skru, tangan perayu menggeletar dan wajahnya berubah merah. Apabila perayu mengumpil dan membuka bingkai gambar tersebut, PW4 menjumpai pita perekat plastik berwarna hitam dilekatkan sepanjang empat penjuru bingkai gambar tersebut, PW4 mengarahkan perayu untuk mencabut pita pelekat tersebut tetapi perayu enggan berbuat sedemikian. PW4 kemudiannya membuka pita pelekat tersebut dan menjumpai ketamin di dalamnya. Perayu dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar 8,488g ketamin. Dalam pembelaannya, perayu memberi keterangan bahawa dia merupakan penjual sari dan sut Punjabi dari India. Menurut perayu, dua rakan perniagaannya yang dikenali sebagai Ansari dan Sarajuddin daripada India telah memintanya untuk membawa beg yang berisi bingkai gambar tersebut ke Kota Bharu. Perayu menyatakan bahawa dia tidak mengetahui bahawa bingkai gambar tersebut mengandungi dadah. Dihujahkan bahawa keadaan fizikal bingkai gambar tersebut menunjukkan bahawa ia tidak boleh dibuka dengan mudah untuk mengetahui kandungannya dan bahawa dadah diselitkan di dalamnya. Oleh itu, mahkamah diminta membuat kesimpulan bahawa perayu tidak mungkin mempunyai pengetahuan bahawa dadah tersebut diselitkan di dalam bingkai gambar tersebut. Hakim Mahkamah Tinggi mensabitkan perayu dan menjatuhkan hukuman mati ke atasnya. Perayu merayu terhadap sabitan dan hukuman.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Pengetahuan adalah inti pati penting kepada kesalahan mengedar dadah. Adalah persoalan fakta sama ada elemen pengetahuan telah dibuktikan oleh pihak pendakwaan. Pengetahuan boleh dibuktikan melalui tiga cara. Pertama, melalui keterangan langsung. Kedua, melalui keterangan hak keadaan atau melalui inferens. Ketiga, melalui bantuan anggapan di bawah s 37(d) ADB (lihat perenggan 24).

(2) Cara yang bijak mengedar dadah dari India ke Kuala Lumpur dan akhirnya ke Kota Bharu melalui kapal terbang menunjukkan bahawa perayu mempunyai pengetahuan mengenai adanya dadah berbahaya yang terselit di dalam bingkai gambar tersebut. Perayu telah melancong ke Kota Bharu tiga bulan sebelum tangkapannya dan tiada mesin pengimbas di Lapangan Terbang Kota Bharu. Tanpa mesin pengimbas, bagasi akan diperiksa secara manual. Sekiranya PW4 tidak memeriksa beg perayu, dadah yang disorokkan di dalam bingkai gambar tidak akan dikesan dan akan memasuki Malaysia. Perayu memiliki dadah berbahaya yang ditemui dalam begnya yang dijumpai bersamanya di Lapangan Terbang Kota Bharu (lihat perenggan 27 & 30).

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(3) Keengganan perayu untuk membuka pita pelekat plastik berwarna hitam pada empat penjuru bingkai gambar menunjukkan bahawa perayu mempunyai pengetahuan mengenai kewujudan dadah berbahaya yang diselitkan pada bingkai gambar (lihat perenggan 30(f)).

(4) Keterangan adalah lebih daripada mencukupi untuk menyimpulkan bahawa perayu mempunyai milikan dadah berbahaya di dalam begnya (lihat perenggan 31).

(5) Perayu tidak cuba untuk memeriksa kandungan beg tersebut dan dia sekadar bersandarkan kepada jaminan Ansari dan Sarajuddin daripada India. Perayu bukanlah seorang yang bodoh atau lurus mahupun mudah tertipu. Perayu gagal menyangkal anggapan statutori mengenai milikan di bawah s 37(d) ADB atas imbangan kebarangkalian. Perayu bersalah kerana secara sengaja tidak mengendahkan kebenaran yang nyata dalam perkara tersebut (lihat perenggan 39).]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017, HC (refd)
PP v Hla Win [1995] 2 SLR 424, CA (consd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (consd)
Ubaka v PP [1995] 1 SLR 267, CA (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 181, CA (folld)

Legislation referred to

Criminal Procedure Code (Cap 68) [SG] ss 121, 122(6)
Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), 39B(2)
Misuse of Drugs Act 1973 (Cap 185) [SG] s 7

Appeal from: Criminal Trial No 45A-10 of 2010 (High Court, Kota Bharu)

K Viknesvaran (Viknes Ratna & Co) for the appellant accused.
Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent prosecution.

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Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The High Court judge convicted the appellant, an Indian national, for trafficking in dangerous drugs, to wit, 8,488g of ketamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the DDA. Aggrieved, the appellant now appeals to this court. The charge framed against the appellant by the prosecution reads as follows:

> Bahawa kamu pada 5 Julai 2009 lebih kurang jam 4.30 petang di Kaunter Pemeriksaan Penumpang Lapangan Terbang Sultan Ismail Petra, dalam Daerah Kota Bharu, dalam Negeri Kelantan Darul Nairm telah mengedar dadah berbahaya iaitu Ketamine seberat 8,488 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE FACTUAL MATRIX

[2] On 5 July 2009, Saidi bin Mohamed ('PW4') — a customs officer, was on shift duty from 3pm until 12 midnight at the inspection counter where transit baggages are inspected at the Kota Bharu Airport. At about 4.30pm, while on duty checking the luggages of disembarking passengers from flight MH1396, PW4 noticed the presence of the appellant who was pushing a trolley laden with two big travelling bags and a sling bag on it towards the customs check point.

[3] PW4 stopped the appellant. And as a normal routine, PW4 inspected the two big travelling bags and a sling bag by checking the tags attached to it. PW4 found flight numbers MH191 and MH1396 were written on the tags which indicated that the baggages were on transit from a foreign country.

[4] PW4 then instructed the appellant to carry one of the bags and place it on the counter for inspection. The appellant complied and carried a dark blue bag (exh P6) with a brand name 'Gateaway' which was locked with a padlock and placed it on the counter. PW4 then instructed the appellant to open the padlock by asking, 'Would you please Sir open your bag'. The appellant responded by putting his hands into his trouser pocket for approximately 30 seconds and he later answered, 'No key'.

[5] On hearing the appellant's response, PW4 requested his colleague by the name of Ainon bt Awang Matasan ('PW7') — a senior customs officer, to get a cutter from their office in order to open exh P6. PW7 complied and returned in less than a minute with a cutter. At that juncture, PW4 saw the appellant was already holding a key in his hand and with that key the appellant

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opened the padlock of exh P6. Inside exh P6, PW4 saw what looked like picture frames wrapped in gift paper wrappings. PW4 then instructed the appellant to open the wrapper of one of the picture frames. Upon the appellant tearing open the wrapper, PW4 saw a transparent plastic wrapping a frame of a scenic photograph. On seeing this, PW4 asked the appellant, 'How much you sell per piece'? The appellant answered, 'Hundred'.

[6] PW4 then held the picture frame in his hand and found it to be heavy. PW4 knocked on the picture frame, and he heard a compact sound. PW4 also found the picture frame to be screwed. PW4 then requested PW7 to get for him a screw driver from his office. PW7 complied and returned with a knife because she could not find a screw driver.

[7] PW4 then requested PW7 to stay and remain with the appellant while he went to get a screw driver from his locker. A moment later, PW4 returned with a screw driver and gave it to the appellant and instructed him to open the picture frames. Using the screw driver, the appellant succeeded in opening only two or three picture frames because the screw driver was not suitable. Again, PW4 requested PW7 to stay with the appellant while he went to get a screw driver from his motorcar. Having obtained the screw driver, PW4 returned and handed it over to the appellant to open the picture frames. The appellant succeeded in opening the screws but the picture frames could not be opened because it was nailed to the wooden frames. PW4 observed that when the appellant was opening the screws with the screw driver, the appellant's hands were shaking and his facial complexion turned red.

[8] When the appellant prised and broke open the picture frames, PW4 saw that there were black plastic tapes placed along the four corners of the picture frames. PW4 instructed the appellant to remove those black plastic tapes but the appellant refused to do so and remained silent. PW4 then told the appellant, 'Sir you have to take off this tape from the frame'. PW4 further told the appellant that, 'If you don't want to do it, I have to do it and you have to see while I do it'. PW4 then opened the black plastic tapes that covered the picture frames. Two thin pieces of plywood were found underneath the black plastic tapes. And when the pieces of plywood were removed, PW4 found beneath it a transparent plastic packet containing white powdery substances. PW4 asked the appellant, 'What is this?', and the appellant, 'I don't know'.

[9] The tag to exh P6 was duly marked as exh P6A.

[10] In regard to the grey coloured second big travelling bag (exh P7) with a brand name 'Mission', the tag was also marked as exh P7A. PW4 directed the appellant to carry and place exh P7 onto the counter for examination. The appellant complied. Exhibit P7 was also padlocked and the appellant used

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another key to open the padlock to exh P7. The same rigmarole to open exh P6 was also undertaken to open exh P7 which finally led to the recovery of a transparent plastic packet containing white powdery substances.

[11] The third bag was a black coloured sling bag with a brand name 'Trust'. It was tendered and marked as exh P12.

[12] At about 5.20pm, Mohamed bin Ab Rahman ('PW8') — a customs officer and also the investigation officer of the case arrived at the Kota Bharu Airport. PW8 was accompanied by a team of customs officers from the Preventive Division of the Customs and Excise Department. PW8 seized the exhibits recovered from exhs P6 and P7 and brought them together with the appellant to the customs office at Kota Bharu for further examination.

[13] At the customs office, upon a close and thorough examination, PW8 found a total of 12 picture frames in P6 and 15 picture frames in exh P7. PW8 also found that each of the picture frames was wrapped in a gift wrapping paper and the canvas cloth was plastered with a black plastic tape and underneath it were two pieces of plywood which were screwed and nailed, and beneath that was a transparent plastic packet containing crystalline substance.

[14] PW8 made markings on all the exhibits seized. The 12 transparent plastic packets containing crystalline substances were packed into a box marked 'E', while the 15 transparent plastic packets containing crystalline substances were packed into a box marked 'F'.

[15] On 6 July 2009 at 2.27pm, a senior customs officer by the name of Mohd Aripin bin Ibrahim ('PW6') sent the two boxes marked 'E' and 'F' to the government chemist by the name of Abdullah Zayawi bin Muda ('PW5'). In due course, PW5 examined and analysed all the substances found inside the two boxes marked 'E' and 'F'. Altogether there were 27 transparent plastic packets. PW5 found them to be clear crystalline substances. According to PW5, they were ketamine, a dangerous drug, as listed in the First Schedule of the DDA weghing 8,488g.

[16] The evidence of PW4 was corroborated by PW7 in material particulars. PW7 also testified that there was no scanning machine at the Kota Bharu Airport.

[17] Nordin bin Othman ('PW2'), the chief operations officer from the Malaysian Airline System ('MAS') attached to the Kota Bharu Airport testified that from their records (exh P8A and P8B), it was confirmed that the appellant boarded flight MH191 from New Delhi to Kuala Lumpur International Airport ('KLIA') with two checked in bags (exhs P6 and P7) and tags as per

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exhs P6A and P7A. From KLIA, the appellant flew to Kota Bharu Airport via flight MH1396 without taking out the two checked in bags (exhs P6 and P7) during transit in KLIA.

THE DEFENCE OF THE APPELLANT

[18] The appellant gave evidence under oath and no witnesses were called by him to support his defence. However, the appellant relied on his cautioned statement marked as exh D1 which was tendered in the course of the prosecution's case.

[19] In his defence, the appellant testified that he was a salesman selling sarees and Punjabi suits from India. He said that he sells these clothes in Malaysia and Singapore. And he also buys used hand phones, air conditioners, television sets and amplifiers from Malaysia and sells them back in India for a profit.

[20] According to the appellant, on 5 July 2009, two of his business friends known as Ansari and Sarajuddin from India had requested him to bring the two bags — exhs P6 and P7, to Kota Bharu. He further testified that at New Delhi Airport, Ansari met him and gave him the said bags and told him that it contained picture frames. Ansari further told him that someone would meet him at Kota Bharu Airport and receive the bags from him.

[21] The appellant further testified that he did not know that the picture frames contained drugs. According to the appellant, when he arrived at Kota Bharu Airport, some customs officers detained him and inspected his bags. He said that he did not try to run away from the customs officers and that he was afraid when told that there were contraband items in the bags. He admitted that, at that time, his hands were trembling.

[22] The cautioned statement of the appellant in exh D1 was recorded by Azidah bt Idris, a customs officer, on 7 July 2009 at about 11.45am. The appellant admitted that he gave the cautioned statement on a voluntary basis. The contents of the appellant's cautioned statement are on all fours with the appellant's oral testimony given on oath. Of pertinent would be the averment by the appellant in his cautioned statement that three months prior to his arrest, he visited Kota Bharu to sell sarees and Punjabi suits but he could not sell these clothes there and he had to bring them to Kuala Lumpur.

ANALYSIS

[23] Before us, only one issue was raised. It pertained to the issue of whether SP4's evidence was consistent with the defence version as alluded to in the

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appellant's cautioned statement in regard to the custody and control of the dangerous drugs, to wit, 8,488g of ketamine. This issue brought forth the nagging question of whether the appellant has custody and control of the dangerous drugs found embedded in the picture frames and has the requisite knowledge of its existence.

[24] Now, knowledge is an essential ingredient to an offence of drug trafficking. It is a question of fact whether the element of knowledge has been proven by the prosecution. Knowledge can be proved in three ways. Firstly, by direct evidence. Secondly, by circumstantial evidence or by inference. Thirdly, with the aid of the presumption under s 37(d) of the DDA.

[25] The tenor of the defence showed that it was a defence of innocent carrier or momentary carrier. This meant that while the appellant acknowledged that exhs P6 and P7 — referring to both bags, were carried by him, yet he disputed having knowledge of the drugs found therein. It was submitted that the physical condition of the picture frames showed that they could not be easily opened in order to discover their contents and that the dangerous drugs were embedded therein. Consequently, it was argued that the appellant could not have easily opened the picture frames to check their contents.

[26] Flowing from that, we were invited to draw an inference in favour of the appellant that the appellant had no knowledge of the dangerous drugs that were embedded in the picture frames. We declined to accept the invitation. We preferred to adopt the approach of Yong Pung How CJ Singapore in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 181 (CA), at pp 186–187, where His Lordship had this to say:

> The fact that the drugs were wrapped up
>
> 21 For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tah Ah Tee v Public Prosecutor* [1979–1980] SLR (R) 311. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
>
> 22 We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's

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claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR (R) 104 (at [51]):

> In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[27] On the other end of the spectrum, the ingenious method of transporting the dangerous drugs from India to Kuala Lumpur and finally to Kota Bharu via flight Nos MH191 and MH1396 must surely indicate that the appellant had knowledge of the presence of the dangerous drugs that were embedded in the picture frames. It must be borne in mind that the appellant had travelled to Kota Bharu some three months prior to his arrest on 5 July 2009 and according to PW7, there was no scanning machine at the Kota Bharu Airport. Without the scanning machine, baggages would have to be manually checked. If PW4 did not check exhs P6 and P7, the dangerous drugs concealed and embedded in the picture frames would not be detected and would enter Malaysia for the Malaysian market.

[28] What prompted PW4 to examine the two bags on the trolley that was pushed by the appellant was because of the inability of PW4 to see the baggage tags on the two bags. The two bags were placed in such a way on the trolley that prevented PW4 to see the baggage tags on those two bags. In the words of PW4, under examination-in-chief at p 20 of the appeal record:

> Semasa penumpang tersebut mendekati kaunter pemeriksaan saya tidak dapat kenal pasti tag bagasi itu secara berhadapan saya tidak nampak tag itu. Saya nampak dia bergerak daripada kaunter pemeriksaan. Dia tolak troley. Saya tidak dapat lihat dengan jelas. Pada masa itu ada 3 buah beg. 2 beg besar 1 beg kecil.
>
> Saya tidak nampak tag yang 2 besar di bawah. 2 beg besar yang atas troley 1 warna biru gelap, 1 warna kelabu dan yang kecil warna hitam.
>
> Apabila tahan, saya periksa tag bagasi itu. Saya lihat tag warna hitam dan putih, tertera penerbangan MH191 dan 1396. 2 beg itu ada tag.
>
> Saya kenal pasti bagasi itu sebagai bagasi transit dan saya arah penumpang supaya angkat ke kaunter pemeriksaan.
>
> Saya tahu transit sebab No. 191, tanda ianya daripada luar Negara. Saya gunakan bahasa Inggeris berkomunikasi dengan beliau dan beliau patuh arahan saya.

[29] This court in *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764 (CA), had occasion to consider the method employed to bring drugs into our country. At p 769, Gopal Sri Ram JCA (later FCJ) writing for this court, had this to say:

> (7) It is true that mens rea possession is an element of the offence of trafficking. But it is an element like the mental element in other crimes which cannot be established by direct evidence save in a case where an accused expressly admits the commission

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of the offence. It has, like the mens rea in other offences, to be established by circumstantial evidence. In other words it is an ingredient that is to be inferred from the totality of the circumstances of a particular individual case. We can here do no better than to quote from the judgment of Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, at p 69:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an expressed admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.

(8) Turning to the facts of the present instance, we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. Of course it all depends on the facts of each individual case.

[30] The High Court judge was correct when His Lordship held that the appellant was in possession of the dangerous drugs that were recovered from his travelling bags which were found with him at the Kota Bharu Airport at the material time. The incriminating evidence adduced by the prosecution, where the defence did not examine PW4 and PW7 on the following salient facts, showed the culpability of the appellant:

(a) PW4 saw the appellant pushing a trolley laden with exhs P6 and P7 — the two bags in question;

(b) the baggage tags attached to the handles of exhs P6 and P7 bore the name of the appellant as seen in exh P55A and P55B (see p 285 of the appeal record);

(c) the appellant was alone at the material time;

(d) the appellant's conduct in responding to PW4's request to open the padlock of exh P6 by putting his hands in his trouser pocket for about 30 seconds and replying, 'No key' were contrary to the fact that the appellant had with him the key to the said padlock;

(e) the spontaneous answer by the appellant that the price per piece for the scenic photograph was a 'hundred' showed by necessary inference that the appellant had knowledge of the contents of exhs P6 and P7;

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(f) when the appellant was opening the screws attached to the picture frames using the screw driver, PW4 observed that the appellant's hands were shaking and his facial complexion turned red; and

(g) the reluctance of the appellant to open the black plastic tapes that covered the four corners of the picture frames which was finally done by PW4 and which revealed the presence of the transparent plastic packets containing white powdery substances showed that the appellant had knowledge of the presence of the dangerous drugs that were embedded in the picture frames.

[31] In our judgment, these damning pieces of evidence were more than sufficient for the High Court judge to conclude that the appellant had possession of the dangerous drugs found in exhs P6 and P7. And that knowledge, an essential ingredient of drug trafficking, had been proved by the prosecution. In this regard, the High Court judge had this to say at p 200 of the appeal record:

> Saya juga melihat kepada sikap tertuduh dari awal lagi kelihatan seolah-olah cuba untuk mengelak dari membuka bag (P6 dan P7) apabila diarah oleh SP4 dengan mengatakan 'no key'. Setelah SP7 datang dengan pemotong besi barulah tertuduh mengeluarkan kunci beg tersebut. Tertuduh jika tidak mempunyai pengetahuan jahat bahawa terdapat dadah dalam beg tersebut sepatutnya membuka beg tersebut setelah diarah dan bukannya menyatakan 'no key'. Seterusnya semasa membuka skru frame tersebut, tangan tertuduh telah mula menggigil dan terketar dan muka tertuduh telah berubah menjadi merah dan enggan meneruskan agar terus membuka lapisan berikutnya juga menunjukkan tertuduh telah mempunyai pengetahuan terhadap apa yang ada dalam frame tersebut.

[32] A maximum evaluation of the evidence by the High Court judge following the guidelines of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63; [1999] 2 AMR 2017 at p 2092; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 (CA); *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 (FC); and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC), was undertaken by His Lordship. At p 203 of the appeal record, this was what the High Court judge said:

> Saya telah meneliti keterangan kes pihak pendakwaan pada tahap maksima dan hujahan oleh kedua-dua pihak, saya mendapati bahawa dua buah beg yang mengandungi bungkusan *frame-frame* gambar adalah berada di bawah pemilikan iaitu tertuduh di mana kawalan dan jagaan adalah jelas dan nyata. Oleh itu anggapan menurut s 37(d) Akta Dadah Berbahaya 1952 diguna pakai walaupun milikan dengan pengetahuan mens rea adalah secara biasa terbukti dari keterangan sekeliling yang kuat dan inferen yang hanya menjuruskan kepada pengetahuan oleh tertuduh melalui kelakuannya.

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[33] Continuing at pp 206–207 of the appeal record, the High Court judge had this to say:

> Yang mana bukti pengedaran secara prima facie telah berjaya dibuktikan secara manual mengikut s 2 Akta. Di mana bukan sahaja *frame-frame* gambar itu banyak tetapi dibungkus dan dibawa dari India hingga ke Kota Bharu adalah terjumlah kepada takrifan mengedar di bawah s 2 Akta ini. Tambahan pula anggapan mengedar di bawah s 37(da) Akta tidak memberi sebarang peruntukan anggapan mengedar untuk dadah jenis 'ketamine' ini.

[34] In regard to the defence of innocent carrier, the High Court judge had this to say at pp 190–191 of the appeal record:

> Tertuduh adalah 'innocent carrier'. Tidak tahu apa yang dikirimkan oleh dua kawannya adalah dadah. Jawapan dan keputusan mahkamah; tindak tanduk tertuduh yang terketar-ketar dan merah mukanya semasa diarahkan oleh SP4 membuka skru *frame* gambar sebelum terjumpa serbuk jernih adalah secara inferennya bahawa tertuduh mengetahui apa benda salah tersembunyi. Malah tertuduh enggan membuka lapisan terakhir dua *plywood* bila diarah membukanya, ini secara inferen menunjukkan tertuduh mengetahui selepas dua lapisan *plywood* ini akan ternampaklah plastik berisi kristal jernih itu. Tingkah laku tertuduh berubah sebelum dadah dijumpai bukannya selepas dadah dijumpai.

[35] It is germane, at this juncture, to refer to the case of *Public Prosecutor v Hla Win* [1995] 2 SLR 424, a decision of the Singapore's Court of Appeal. In that case, the respondent was acquitted of a charge of importing into Singapore not less than 3,468g of diamorphine, an offence under s 7 of the Misuse of Drugs Act. Against his acquittal, the prosecution appealed. The majority, Karthigesu and LP Thean JJA dismissed the appeal and affirmed the decision of the High Court to acquit the respondent. Yong Pung How CJ (Singapore) dissented and he allowed the appeal and convicted the respondent.

[36] The facts in *Public Prosecutor v Hla Win* may be stated as follows. The respondent was arrested soon after his arrival at the Changi Airport on 23 July 1994 via Silkair Flight M1895 from Hatyai, Thailand. While pushing a trolley towards the customs clearance area laden with a brown leather bag and a white paper bag, customs officer Wang stopped the respondent as he was behaving suspiciously by looking to the left and right. Senior customs officer Ang examined the brown leather bag and found white powder inside it which was later confirmed to be the subject matter of the charge. When questioned by customs officer Wang, the respondent replied that he was carrying precious stones. Later when the respondent was in the custody of chief customs officer Koh, and upon being questioned, the respondent described the circumstances that led to his coming to Singapore and that he was recruited by one Maung Maung to carry stones to Cebu via Singapore. The respondent lived in Bangkok and came to know Maung Maung, a fellow Burmese Muslim, from

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his regular attendance at a mosque and from Maung Maung's patronage of his 'roti prata' stall. About three months after he came to know Maung Maung, the latter arranged to meet him at a McDonald's restaurant where he was asked to help Maung Maung smuggle some gems to Cebu in return for a reward. Maung Maung assured the respondent by swearing on the Qur'an that he would only be carrying gems. The respondent then agreed to take up the assignment. The respondent also described how he travelled from Bangkok to Hatyai, stayed overnight in Hatyai and then continued his journey to Singapore. The respondent also said that from the start of his journey in Bangkok to the time he checked in at the Hatyai Airport for the flight to Singapore, he was always accompanied by one person by the name of Yusoof. In regard to the brown leather bag, it was given by Maung Maung to the respondent and Yusoof at the Bangkok Airport. Thereafter, the brown leather bag was handled mainly by Yusoof and the respondent only opened it for the very first time in Singapore. However, the respondent did not say anything in his s 122(6) statement recorded under the Criminal Procedure Code. Later, a long detailed statement was recorded from him under s 121 of the Criminal Procedure Code where he advanced a detailed defence. In essence, his defence was that he did not know that the brown leather bag contained drugs and that he thought that he was carrying gems. LP Thean JA writing for the majority at pp 436–437 had this to say:

> Our decision
>
> Essentially, in these arguments the prosecution attacked the findings of fact made by the learned trial judge, and relying on the suspicious circumstances of the case urged this court to draw inferences against the respondent which the learned trial judge should have drawn. We were, however, not persuaded by these arguments. These findings of fact were made by the learned trial judge after a careful deliberation and they turned on the learned trial judge's evaluation of the evidence of the respondent. It is settled law that an appellate court will not interfere with a trial judge's findings of fact based on the credibility and veracity of the witnesses whom the trial judge has seen and observed when giving evidence, unless the findings are clearly against the weight of evidence and unsupportable: see *Lim Ah Poh v Public Prosecuto*r [1992] SCR 35, at p 42; *Public Prosecutor v Poh Oh Sim* [1991] 3 MLJ 416, at p 417 and *Public Prosecutor v Sugianto* [1994] 2 SLR 1, at p 5. On the evidence before the learned trial judge, it cannot be argued that his findings were against the weight of evidence and unsupportable.
>
> The learned trial judge found that the respondent had not fabricated the existence of such a person called Maung Maung. The evidence adduced for the defence showed that a person called Maung Maung booked two tickets for the flight from Bangkok to Hatyai and that the respondent and another passenger Myo Lwin travelled on these two tickets. The telephone number of Maung Maung in the records of Thai Airways was the same number recorded in the book found in the possession of the respondent. All this evidence corroborated what the respondent had said in his lengthy s 121 statement which was recorded soon after his arrest. The evidence of Miss Lim of what she had found in her investigation with reference to

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the various localities in Bangkok and the hotel in Hatyai also corroborated what the respondent had said in the s 121 statement.

The crucial point in the evidence of the respondent which, of course, was not corroborated by other evidence was his agreement to carry for Maung Maung precious stones out of Thailand to the Philippines via Singapore and his evidence that he did not know that what was concealed in the bag was drugs. On this issue, the learned trial judge who had seen and heard the respondent giving evidence found that what the respondent said was on the balance of probabilities credible and accordingly he accepted his evidence. He came to this conclusion after a careful consideration of all the evidence including the suspicious circumstances raised by the prosecution.

It is true that in this case clearly the task of the respondent to rebut the statutory presumptions of possession of the drugs and knowledge of the nature of the drugs in the face of the suspicious circumstances relied upon by the prosecution was a difficult one. First, in particular, the respondent had the mens rea to smuggle gems or precious stones out of Thailand to the Philippines via Singapore; he had knowledge of the illicit nature of the contents of the bag he carried. Secondly, all too often drug couriers raise the well-known and common defence that they were deceived by someone else and that they believed that what they carried were contraband articles but not drugs. However, the learned trial judge was fully alive to the suspicious circumstances in this case and to the defence all too often raised by drug couriers. He clearly had these matters in mind when he assessed and evaluated the evidence of the respondent, and notwithstanding such matters he found the respondent's evidence credible. In our opinion, on the basis of the evidence before the learned trial judge, we can find no ground for saying that he was in error in so finding. It is not the law that by reason of the respondent's knowledge of the illicit nature of the content of his bag his evidence that he did not know that the content was drugs could not and should not be believed. Such knowledge on his part only renders it all the more difficult for the court to believe his evidence. Very much of course depends on the circumstances of the case.

The learned trial judge also directed his mind to the fact that the respondent said nothing in his s 122(6) statement. But he drew no adverse inference against the respondent. First, before the statement was made the respondent had told CCO Koh that he was carrying precious stones to Cebu for Maung Maung and how he agreed to be a courier of the precious stones for Maung Maung. Secondly, soon after the s 122(6) statement, the respondent gave a detailed account of the events in the s 121 statement. The learned trial judge found that probably there was some miscommunication between the respondent and Miss Swe, the interpreter, on the need to give a statement.

It is clear to us that the learned trial judge found it significant that the defence of the respondent as contained in the s 121 statement was confirmed in some material respects by the documentary and other evidence adduced by the defence, and that to a considerable extent his evidence in court was consistent with what he had earlier said in the s 121 statement. This is of particular importance in this case, as the s 121 statement was furnished to the respondent's counsel only shortly before the trial commenced. In our judgment, the learned trial judge on the evidence before him

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was justified in coming to the conclusion that the respondent had rebutted the statutory presumptions. We can find no grounds for interfering with these findings.

[37] In a strong dissenting judgment, Yong Pung How CJ (Singapore) restated the law in *Public Prosecutor v Hla Win* at pp 438–439 in this way:

> At this juncture, I emphasise that where the accused, who is not an innocent custodian in the sense that the drugs were planted in his bag without his being aware of them, accepted the goods in circumstances which rendered the taking of the precaution of satisfying himself that the goods were what they purported to be and were not drugs an imperative, then, if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of wilful blindness to the obvious truth of the matter. In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. In this connection, I am mindful of the principle that the appellate court should generally defer to the conclusion which the trial judge has formed when a trial judge makes findings of fact, including a finding of inferential fact of knowledge, based on the credibility of witnesses. However, this principle of law is not absolute and inflexible. The appellate court cannot, merely because the question is one of fact, and because it has been decided in one way by the trial judge, abdicate its duty to review his decision, and to reverse it, if it deems it to be wrong, in the sense that it is against the weight of the evidence and unsupportable. It would be different where inferences are to be drawn only from truthful evidence. I refer to the cases of *The Glannibata* [1876] 1 PD 283, *Public Prosecutor v Poh Oh Sim* [1991] 3 MLJ 416 and *Public Prosecutor v Sugianto & Anor* [1994] 2 SLR 1 in support of these uncontroversial propositions. With that, I advert to the evidence before me.

[38] Continuing at the same page and spilling over to pp 440–441, His Lordship analysed the case lucidly in these salient words:

> The evidence
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> I respectfully adopt the meticulous account of the evidence adduced at the trial given in the grounds of judgment of the majority. I shall only highlight and discuss the evidence pertinent to the question of knowledge.
>
> By his own admission, the respondent was not an innocent custodian in the sense that the drugs were planted in his bag. He was not even an innocent custodian in the wider sense that he was carrying something innocuous for someone else. Instead, the respondent had agreed to smuggle a bag of gems out of Thailand for Maung Maung, knowing that it was an unlawful act. In return, he expected a substantial reward of US$3,000, some Thai Bahts and a passport for his services. Having been asked to smuggle something illicit, I found that there was already a strong reason for the respondent to be suspicious of the goods and to find out what he was carrying.
>
> Reverting to the evidence before me, I found that the respondent, had other grounds to be suspicious of the goods he was carrying. The respondent claimed he believed Maung Maung's words and oath that the bag contained only gems; there was little reason for him to do so because Maung Maung was virtually a stranger. A

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quick review of the background of the respondent revealed that he was quite capable of taking care of himself. As a student, he lived away from his home and family in Yangon. He also took part in a student uprising against his government. For six years, he lived alone in Thailand as an illegal immigrant. During this time, he was constantly on his guard for fear of capture and deportation by the Thai authorities. Indeed, he had been captured on three occasions and sent back to Myanmar. Each time, he managed to return to Thailand. The respondent was hardly a naive or a gullible person. In view of his background and experience, his claim to have reposed such a high degree of trust in Maung Maung was incredible, more so in the light of the fact that he had been asked to take up a job which involved some risk. Although they were of the same faith and nationality, the fact remained that he had barely known Maung Maung for three months.

In addition, the questions the respondent asked first of Maung Maung and then of Yusoof about the contents of the bag evinced a lack of trust. In Bangkok, after Maung Maung had told him about the assignment, the respondent asked Maung Maung whether the bag contained only gems. He said in evidence:

> ... Yes Sir, I asked whether it is true that the bag contained gem stones only ... I asked Maung Maung then Maung Maung told me to go to the mosque and said he will swear holding the Qu'ran ...

Subsequently, whilst in Hatyai, he made the same enquiry of Yusoof. He said in his long statement, as later affirmed in evidence:

> ... I did ask for the contents of the bag but Yusoof told me there was no need to do so as there were only gems in the bag and those things cannot land me into trouble ...

It was clear from the questions asked, especially the one posed to Yusoof, that he was suspicious of the contents of the bag being gems only and was anxious about not getting himself into serious trouble. He also did not completely trust Maung Maung's words and the oath.

In the light of the above, my next question was what did the respondent suspect or fear that the bag might contain? He was prepared to smuggle gems, knowing that the smuggling of gems might get him into trouble. However, he was willing to accept the risk of a fine or a short term of imprisonment. Obviously, the respondent was not afraid of the smuggling of contraband which carried the same type of risk and entailed the same sort of consequences. He must have been concerned about the smuggling of something which might have far more serious repercussions. On the evidence, the respondent spent his entire life in the region, commonly referred to as the Golden Triangle, which is the hub of illicit drug activities. Again, taking into account his background, I was convinced that the respondent knew of the existence of the lucrative but illegal trading in drugs. In the premises, the irresistible inference must be that he was suspicious that there might well be drugs in the bag and that he was being asked to be a drug courier.

In all the circumstances, I thought it incumbent on him to check the bag for its true contents. However, he did not do so. This, in my view, was the most fatal weakness in the defence. I found that he had ample opportunity to do so in Hatyai. It was his evidence that after lunch he stayed with Yusoof in the hotel room all afternoon until

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they left for the Hatyai Airport at 5.30pm. During this time, they managed to get some rest on their beds. They did not talk to each other when they were resting and he did not know if Yusoof took a nap. In those few hours, the respondent did not take any steps to examine the bag although it remained unlocked at all material times. There was certainly no evidence that he was prevented by Yusoof from checking it. It was incredible that an assurance by Maung Maung would operate so strongly on his mind that he would forgo the chance, which he had, to ascertain the truth for himself and to avoid a potential situation of peril. In any case, I had already found that he did not trust Maung Maung completely as he claimed.

With the greatest respect to the learned trial judge and to my learned brethren, I found that the proper inference to be drawn from the facts and circumstances was that the respondent had wilfully shut his eyes to the obvious truth of the matter. The respondent did not want to know and chose not to find out that he was carrying drugs. Quite apart from the presumption within s 18(2) of the Act, such wilful blindness was tantamount to knowledge. In the premises, I found that the acceptance of the respondent's belief that he was carrying gems was wrong and could not be supported by the evidence. For the sake of completeness, I add that, in my view, the respondent had not rebutted the statutory presumption that he knew that he was carrying drugs.

In coming to my conclusion, I appreciated the fact that the respondent had been a very consistent witness. His long statement made shortly after his arrest and his evidence in court were substantially similar. Moreover, the independent evidence obtained by counsel for the respondent supported many aspects of his evidence. Nevertheless, I was of the opinion that the corroboration of his evidence and his consistency must be viewed with caution. The matters so substantiated, including the existence of Maung Maung, the Haroon Mosque, the McDonald's Restaurant, the existence of Yusoof, the flight to Hatyai, the stay in Haadyai International Hotel and finally the flight to Singapore were features common to the operation of any smuggling outfit, whether of drugs or of gems. They were relevant to show that the respondent was a courier, which was in any event undisputed. However, these aspects were immaterial to the question of the respondent's knowledge of what he was smuggling. As such, his truthfulness in these matters should not, in my view, be accorded undue weight when dealing with the question of knowledge. Accordingly, I would have allowed the appeal and convicted the respondent.

[39] Likewise here, the appellant did not take the trouble to inspect the contents of exhs P6 and P7 and he merely relied on the assurances of his business friends known as Ansari and Sarajuddin from India. The appellant was not a simpleton nor was he naive or gullible. At the time of giving evidence in court, he was 54 years of age and he used to do business in Singapore between 6–7 years. He too used to do business in Malaysia. His forte was in selling sarees and Punjabi suits from India and he would sell them in Malaysia and Singapore. He used to visit Kota Bharu bringing with him Punjabi suits to sell but he was unsuccessful because there were not many Indians in Kota Bharu and he had to sell them in Kuala Lumpur. He admitted that on 5 July 2009, if he had not met Ansari and Sarajuddin, he would not have gone to Kota Bharu. And when he proceeded to Kota Bharu on 5 July 2009, he did not bring along

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the sarees and the Punjabi suits to sell in Kuala Lumpur and not in Kota Bharu. He said that he believed Ansari and Sarajuddin. That being the case, in our judgment, the appellant failed to rebut the statutory presumption of possession under s 37(d) of the DDA on the balance of probabilities. And that the appellant 'would be guilty of wilful blindness to the obvious truth of the matter' (to borrow the words of Yong Pung How CJ (Singapore) in *Public Prosecutor v Hla Win*).

[40] The High Court judge analysed the defence advanced by the appellant with a fine toothcomb and at pp 211–212, this was what His Lordship said:

> Pembelaan tertuduh secara keseluruhannya menafikan akan pengetahuan beliau terhadap dadah yang ada dalam beg tersebut dan justeru itu gagal untuk menangkis anggapan di bawah s 37(d) Akta Dadah Berbahaya 1952 dan keseluruhan pembelaan juga gagal menimbulkan keraguan di dalam kes pendakwaan di mana pihak pendakwaan telah berjaya membuktikan kesnya tanpa sebarang keraguan yang munasabah.
>
> Dari keterangan pembelaan jeias bahawa kedatangan tertuduh ke Kota Bharu hanya untuk menghantar barangan rakan beliau yang merupakan *frame-frame* gambar. Berdasarkan kepada keterangan SP4, tertuduh memaklumkan *frame* ini dijual RM100 setiap satu, walaupun begitu harga ini dinafikan oleh tertuduh. Berdasarkan kepada jumlah *frame* yang ada sebanyak 27 keping dan jika keuntungan jualannya adalah seratus peratus pun ianya tidak memadai untuk membayar tambang kapal terbang tertuduh walaupun tertuduh menyatakan bahawa rakan beliau hanya menanggung tiket dari KLIA ke Kota Bharu sahaja. Diteliti pada *frame* gambar tersebut dan saiznya ianya boleh dibeli di Kota Bharu atau di merata-rata tempat di Malaysia dengan harga paling mahal hanya RM30.00 sahaja. Sebenarnya bukan *frame* gambar tersebut yang hendak diperdagangkan oleh tertuduh tetapi dadah 'ketamine' di dalamnya yang membawa keuntungan utama.

[41] Continuing the analysis of the defence, His Lordship aptly said at pp 212–214:

> *Frame-frame* tersebut telah dibungkus dengan kertas bungkusan hadiah dan secara lojiknya adalah tidak munasabah ianya untuk dijual jika ianya telah dibungkus dengan begitu baik sekali melainkan ianya telah mempunyai niat untuk menghindarkan atau mengelak ianya dibuka oleh pihak lain memandangkan ianya telah dibungkus dengan elok. Kalau saya seorang pegawai kastam yang tidak mahu bersusah payah di dalam menjalankan tugas sudah tentu saya akan melepaskan tertuduh tetapi sikap pengadu patut dipuji kerana telah menjalankan tugas dan tanggungjawab beliau dengan begitu teliti sehingga tertuduh berjaya ditangkap.
>
> Pembelaan tertuduh juga melihatkan seolah-olah beliau tidak perlu ke Malaysia kerana kain *reject* tidak terdapat pada masa itu di Madras tetapi dalam satu keadaan lain pula kelihatan bahawa tertuduh begitu terdesak untuk datang ke Kota Bharu hanya untuk menghantar *frame-frame* gambar tersebut sehingga sanggup untuk berhutang bagi membeli tiket kapal terbang. Kenapa tidak sahaja rakannya yang membawa barangan tersebut ke Kota Bharu dari Madras kerana barangan tersebut milik rakannya. Pembelaan tertuduh juga menunjukkan bahawa beliau tidak

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mengetahuai siapa yang akan datang mengambil beg tersebut di lapangan terbang Kota Bharu, satu pembelaan yang aneh dan tidak munasabah dan gagal menimbulkan sebarang keraguan. Jikalah benar ianya hanya *frame* sebagaimana yang dikatakan oleh tertuduh tidak ada sebab untuk rakan beliau tidak boleh memberi nama dan nombor telefon penerima beg tersebut agar senang dihubungi oleh tertuduh, tambahan pula tertuduh ada membawa handphone (P79) semasa ditangkap. Perkara ini adalah sesuatu yang perlu kerana jika setibanya tertuduh di lapangan terbang Kota Bharu dan penerima beg tersebut gagal muncul di lapangan terbang, di mana akan tertuduh simpan beg tersebut atau siapa yang perlu beliau hubungi. Jika seseorang itu berniat baik dan barangan yang dibawa bukan dadah adalah telah menjadi amalan bahawa beliau akan meminta dari pengirim nama dan alamat penuh penerima atau lain-lain maklumat yang membolehkan beliau mencari penerima tersebut dan bukannya secara tidak menentu dan tidak mengetahui kepada siapa barang tersebut akan diserahkan.

Secara perbandingan kos tiket kapal terbang dari New Delhi dengan hantaran melaiui pos adalah lebih murah diposkan sahaja barangan tersebut jika benar tertuduh datang ke Kota Bharu semata-mata untuk menghantar barangan *frame-frame* tersebut sahaja, tetapi jika libatkan dadah maka barulah perlu dihantar oleh tertuduh sendiri kerana tidak mahu nama pengirim dan penerima diketahui.

[42] Another interesting case to refer to would be the case of *Ubaka v Public Prosecutor* [1995] 1 SLR 267, a decision of the Singapore's Court of Appeal with a coram of Yong Pung How CJ (Singapore), Karthigesu and LP Thean JJA. In that case, the appellant arrived in Singapore on transit from Bangkok on Swissair flight SR 182 and he was scheduled to leave Singapore on another Swissair flight to Zurich and then to Lagos, Nigeria. Narcotics officers kept constant surveillance on the appellant and eventually these officers arrested the appellant. The airline ticket that was recovered from the appellant showed that he had two baggage tags attached to it. Later from the baggage area of Terminal 2, the two pieces of baggage were retrieved in the presence of the appellant and they consisted of a brown sling bag and a black travelling bag. The two bags were examined and the narcotics officers found dangerous drugs therein weighing a total of 8.968g of diamorphine. In due course, the appellant was charged and convicted under s 7 of the Misuse of Drugs Act for importing the said drugs into Singapore. The defence of the appellant was alluded to by the learned trial judge in this way, 'that he was an earnest man who had travelled from Nigeria to Thailand in search of employment and was tricked into carrying the bags with the hidden diamorphine on his way home'. The tenor of the appellant's defence was that he was an innocent carrier without the necessary knowledge. The Court of Appeal held that the appeal had no merit and that the appellant had not rebutted the statutory presumption on the balance of probabilities.

[43] At the end of the day, whether the defence of innocent or momentary carrier succeeds will undoubtedly depend on the facts of each case. It must be

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borne in mind that no two cases are alike. A defence of this nature when invoked means that the accused has no knowledge of the presence of the drugs although physical custody or control is proved.

CONCLUSION

[44] In our judgment, taking the defence and considering it against the context of the whole case, we found that it had fallen far short of rebutting the presumption under s 37(d) of the DDA on the balance of probabilities and as such, it had not raised a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt.

[45] Accordingly, we dismissed the appeal of the appellant. We affirmed the conviction and sentence of death against the appellant. There is no merit in the appeal. It is safe to convict the appellant.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum